An in-depth review of the record before the court reveals that aesthetics appears to be at the heart of Petitioner's objections. But, obviously, that was a concern that was before Respondent. Of course, aesthetics is a term that applies to one's sense of the beautiful. It is part of the cliche that beauty is in the eye of the beholder. Thus, art collectors confirm the beauty of a Picasso by the extravagant prices that are paid; and there are those who believe Picasso's are no more than daubed and angular speculations that distort a canvas (except for his so-called Blue and Pink Periods).

Searching the record here is a vain pursuit in looking for those elements that define the arbitrary and the capricious. Petitioner has gone to great and convoluted lengths in its attempt to condemn the tower. No suggestion is to be found that Petitioner will suffer any significant economic harm. Indeed, there is no perceivable injury, unless it is some unredressable, speculative and unspecified chimera lost in the multiple variants of aesthetics. Nowhere does Petitioner make an effort to show that Fordham's use of its property is dangerous or in conflict with any zoning ordinance restrictions, or that the tower will bring about some undesirable change in the character of the neighborhood, a neighborhood in which Fordham University has been located since 1845.

From all that appears in the fulsome record:

> Respondent painstakingly took into account all the required factors and that its

determination "rests comfortably on a rational basis and substantial evidence" * * *.

Matter of O'Keefe v. Donovan, 199 A.D. 2d 681, 682.

To the same effect, see Matter of Collins v. Lonergan, 198 A.D. 2d 349, 350; Matter of Kattke v. Incorporated Village of Freeport, 200 A.D. 2d 746, 747; Matter of Cunningham v. Kerst, 203 A.D. 2d 636, 637.

This dispute, of course, is a matter of great moment to all sides and its importance is reflected in the circumstance that in March and April, the court received correspondence including citations counsel obviously believed were important, if not dispositive and wholly on all-fours. One such citation is Kleinhaus v. Zoning Board of Appeals of Cortlandt (N.Y.L.J., March 26, 1996, p. 37, col. 3.) Kleinhaus appears to express the opinion that Presnell v. Leslie, 3 N.Y. 2d 384, a 1957 case, has been effectively discounted as appellate authority because of a subsequent promulgation of PRB-1, issued by the Federal Communications Commission in 1985. Presnell may be said to support the position that the size of a structure, rather than its functional relation to the principal use determines the accessory use status. PRB-1, partially codified at 47 CFR §97.15, addresses a policy position that conflicts between amateur radio operators and restrictive zoning ordinances should be avoided. Since restrictive ordinances should be avoided, PRB-1 states that "consequently, a limited preemption policy is warranted." It was added that regulations that preclude amateur communications must be

preempted. The regulation stated that it would not "specify any particular height limitation [for an antenna] below which a local government may not regulate", nor "will we suggest" mechanisms for special exceptions.

And, as PR8-1 continued, "even where height of antennas [is] based upon health, safety or aesthetic considerations, any such restrictions by local regulations, must be crafted to accommodate the local authority's legitimate purpose" (¶25, 47 CFR §97.15[e]. And, while local regulation of antenna heights, has a firm and well recognized role when disputes arise, Kleinhaus makes bold to assert that, not only do FCC regulations have the force of statutes, but that the regulations also preempt local zoning laws to the limited extent provided in the regulations themselves, citing Pental v. City of Mendola Heights, 13 F. 3rd 1261 (8th Cir., 1994); et al.

PRB-1, at the outset, states that "a limited preemption policy is warranted" and that "State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." That ratio decidendi is then supported in the following language:

> "25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. * * * We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such mechanisms

for special exceptions, variances or conditional permits." * * *

The proper regulatory and administrative bodies of the City of New York have duly approved the construction of the disputed antenna tower on the Fordham campus. The objections that bring the matter to this court appear to be to height and only to height. Fordham's application for permission to proceed with the construction of the antenna was granted. Construction proceeded. When almost half completed, Petitioner raised what are essentially aesthetic objections.

Technically, at least, laches should serve as a bar to the Petition; but there are other and more traditional and forceful reasons not to disturb the administrative rulings: The papers and the arguments that seek annulment of the determination of the Respondent that the antenna tower is an accessory use by Fordham simply fail in their mission. In effect, Petitioner asks this court to adopt its conclusions and embrace them as the court's decision. But, as earlier noted, the court is forbidden to substitute its own opinion for that of the administrative agency that has uttered its determination. Moreover, there are practical down-to-earth reasons supporting the propriety of Respondent's approval of the tower. As a broadcasting facility, it is necessary for Fordham to comply with FCC guidelines on non-ionizing radiation exposure. (R. [illegible]) Without the new antenna, WFUV will be unable effectively to transmit its licensed signal by reason of high-rise structures in the area of the University. In addition, the old

antenna site (that would be replaced by the one in dispute), suffers from cracks and stress signs. (R. 262-284.)

There are mentions of several other university radio stations that need not be repeated here. And while Petitioner's papers make a rather incomplete attempt to address the need for Fordham to complete a full environmental impact statement, that is a matter still under FCC consideration, according to Fordham's memorandum of law. The court is told that Petitioner's aesthetic concerns will there be addressed. Suffice it to say, the long recognized use by Fordham of its property and its use of its property to construct an accessory use facility, falls squarely within the parameters of §12-10 of the New York City Zoning Resolution defining the term "accessory use." It is "a use conducted on the same zoning lot as the principal use to which it is related (whether located within the same or an accessory use of the land) * * * and

b. "Is a use which is clearly incidental to and customarily found in connection with such principal use * * *." A finding that declared that the operation of Fordham's FM station, WFUV, was other than an accessory use would be odd indeed. **Operation of the station and its antenna was proper before the construction of a new tower antenna was begun and there is no diminution of accessory use simply because of a relocation of the antenna and at a height that will give practical existence and reach to the station's signal.**

Clearly, all of these matters were before the Respondent; all were considered by the experts who make up the membership of the Board of Standards and Appeals. It would be an arrogant abuse of

judicial power to annul a finding by that body, absent the sine qua non for such a radical step, namely, that Respondent was arbitrary and capricious. The record before the court does not justify a finding of abuse of discretion, the presence of caprice or arbitrariness. Petitioner's outcry is simply not justified. Respondent's determination is fully justified. No reason appears other than to observe the judicial deference that is proper, absent some striking abuse by the administrative agency. See Matter of New York State Clinical Lab Assn. v. Kaladjian, 85 N.Y. 2d 346, 356. To the same effect is Collins v. Lonergan, supra, 198 A.D. 2d 348, (and the many progeny of Fuhst v. Foley, 45 N.Y. 2d 441, 444).

For Petitioner to argue that the tower antenna is not an incidental accessory use, raises the question why that claim was not made years ago. But, it was not. Nor can Petitioner minimize the importance of its hands-on knowledge of all aspects of Fordham's application and actual building of the antenna tower. It did nothing until the tower was 50% completed. Thus, there is a tinge of unfairness in Petitioner's posture and the taint of laches, a posture that equity does not gladly tolerate.

For all of the foregoing reasons, Petitioner may not prevail in this proceeding. The determination of the Board of Standards and Appeals reveals no infirmity that can be characterized as arbitrary or capricious. There are strong rational bases for the determination sought to be undone, a determination that is well supported in the record before the Court. Accordingly, the determination will not be judicially disturbed and the

determination brought here for review is sustained. The petition is dismissed.

Dated: June 10, 1996

JA-S

J. S. C.

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DATE: June 12, 1996

OPERATOR: MF

TOTAL PAGES: 12

RE: N.Y. BOTANICAL GARDEN
v. NYC BORAD OF STANDARDS AND APPEALS

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